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IN THE

Supreme Court of the United States

October Term, 1973.

No. 72-1719

WILLIAM J. BENDER,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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PLAINTIFF'S REPLY BRIEF

If defendant is right, this Court proclaims two concepts of law, each diametrically opposed to the other. The one, (contended for by plaintiff) - that laches never bar an attack upon a void judgment or order,* - the

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* Kilbourn v Thompson,(1880) 103 US 168, 198 and Supreme Court cases there cited.

other, (contended for by defendant) - that laches is a bar to the attack.**

Of course, no such conflict exists, and this Court has not, as we shall see, adopted mutually exclusive concepts of law.

Of a void order, we said on pages 22-23 of our main brief:

> "In the case of Thayer v Village of Downers Grove, (1938), 369 Ill. 334, 16 N.E. 2d 717, the Court there expounded the rationale of the principle, as follows:
>
> > 'Where the Court entering the judgment has exceeded its jurisdiction and such judgment or decree transcends the statute conferring jurisdiction on the Court, such judgment or decree is void and may be collaterally impeached or set aside on motion after the time for review by appeal has expired. (Citations). It is a rule well established that a void judgment or order may be

** Nicholas v. United States, 257 US 71, citing Arant v. Lane, 249 US 367.

vacated at any time and the doctrines of laches and estoppel do not apply. Jurisdiction in a particular case is not only the power of the Court to hear and determine it, but also the power to render the particular judgment entered, and every act of the Court beyond its jurisdiction is void. People v. Shurtloff, 355 Ill. 210 189 N. E. 291; People v. Circuit Court of Washington County, 347 Ill. 34, 179 N.E. 441; People v. Sullivan, 284 Ill. 28, 119 NE 40; Ex Parte Reed, 100 US 13, 25 L.Ed. 538."
(Emphasis added)

In Ex Parte Reed, 100 US 13, 25 L.Ed. 538, last above cited, the Supreme Court declared:

> 'We do not overlook that there must be jurisdiction to give the judgment rendered as well as to hear and determine the cause. * * * ' "

And on page 25 of our main brief:

> "As early as almost a century ago, this Court in Kilbourn v. Thompson, (1880), 103 US 168, 198; 26 L.Ed. 177, noted

that the tendency of the Courts "everywhere" is to the doctrine that:

> '... the jurisdiction of a Court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; The Gas-Light & Coke Co., 19 Id 58; Pennoyer v. Neff, 95 US 714.' "

In the face of those authorities, the defendant in its brief in opposition now relies on Nicholas v. United States, 257 US 71, which cites Arant v. Lane, 249 US 367. The defendant's reliance is misplaced. It may be observed at the outset that neither of the challenged orders in those cases were void. Both of those cases involved a simple application of the bar of laches to a stale claim. In neither case was there a

jurisdictional attack upon the authority of the Secretary to make the challenged order. The Secretary, in both cases, had the power to make the challenged order. The question in each case there presented to the Court was whether, having that power, it was exercised in compliance with the statute. In Nicholas, the Court so stated (at page 75 of 249 US):

> "The question presented is whether the plaintiff may recover his salary when removed without compliance with the statute*, where he delays taking any steps to test the legality of his removal, or asking for an opportunity to be heard for the length of time herein shown.
>
> , We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection, and may not

* As distinguished from "... when removed without power ...."

> for an unreasonable length of time, acquiesce in the order of removal which it was within the power of the Secretary to make, and then recover for the salary attached to the position." (Emphasis added)

Thus, there was present in Nicholas precisely what is absent in our case, namely, jurisdiction - the power to make the order under attack.

In the Arant case also there was no jurisdictional attack. The authority of the Secretary in the Arant case to make the order was not challenged, was not considered, and was not even discussed. This Court so stated, (at page 371 of 249 US), as follows:

> "Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him, and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia on the ground of laches and the

case is here on writ of error.

* * *

> We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically (as distinguished from jurisdictionally) justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed." (Emphasis added)(Matter in parenthesis supplied)

Having the power to remove the relator, jurisdiction attached. Once jurisdiction existed, the failure to give notice was a "technicality" to which laches applied upon delay. In Nicholas and Arant, this Court was dealing with orders which the Secretary had power to make. For that reason Nicholas and Arant do not, and cannot stand as authority for our case, since in our case the orders are challenged as void

for lack of power to make them.

We are aware that in Nicholas, (at p.74), the Court noted the nature of the plaintiff's claim there as follows:

> "It is alleged that being able and willing to discharge the duties of the office, plaintiff was entitled to compensation because of his illegal removal by failure to comply with the provisions of the Act of August 24, 1912, 37 Stat at L 555, * * *." (Emphasis added)

And we have seen that this Court, in stating the question there presented for review, said:

> "The question presented is whether the plaintiff may recover his salary when removed without compliance with the statute where he delays taking any steps to test the legality of his removal, or asking for an opportunity to be heard for the length of time herein shown." (Emphasis added)

In no sense did this Court there suggest by that language that the claim of "illegal removal", and the need to

test the "legality" of the removal involved an attack upon the orders as jurisdictionally void. The defendant at bar, however, availing of those quoted words in its brief, says of the Nicholas and Arant cases that:

> "These decisions control this case. There is no authority for petitioner's view that a different rule should apply whenever the claimant argues that the order of removal or reduction was 'void' rather than simply 'unlawful'. Regardless of the label used, the claimant may not sit on his rights." (Emphasis added)

The orders in Nicholas and Arant "which it was within the power of the Secretary to make" that were there called "unlawful" for failure to comply with the statute may not be equated with the orders in our case which for want of power to make them were and remain legal nullities binding on no one.

This brings us to the distinction between void and voidable orders and

judgments. Voidable judgments, of course, are those which are valid until avoided.

The beginning point, then, is that ours is a collateral attack upon the orders as absolutely void on their face for want of jurisdiction to make them.

Of collateral attack, Freeman on Judgments (5th Ed.) (Sec. 321, p.641) states:

> "The contention of a collateral assailant must be that the judgment he is attacking is void not merely voidable;that either it emanated from a tribunal having no legal existence, or else was rendered without jurisdiction, owing to the fact that the Court pronouncing it may have failed to acquire the requisite jurisdiction in the first instance, or may have lost jurisdiction in the course of the proceedings, or else transcended its lawful powers in making the decision." (Emphasis added)

Of void and voidable judgments, the same author states, (Sec. 322, p.642):

> "A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect, no judgment at all, conferring no right and affording no justification. Nothing can be acquired or lost by it: it neither bestows nor extinguishes any right, and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title. It neither binds nor bars anycone. All acts performed under it and all claims flowing out of it are void. * * * The fact that the void judgment has been affirmed on review in an appellate court or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to plaintiff, but constituting a constant menace to defendant.
>
> The line is carefully drawn between the foregoing judgments that are wholly void and

> those that are merely voidable. Collateral attack does not reach the latter adjudications. The law provides adequate remedies for obtaining direct relief from erroneous or irregular decisions. It is not the policy of the law to permit a party to such judgments to stand idly by without availing himself of the opportunity given him to repair the mistakes and missteps of a court acting within its jurisdiction although in an erroneous manner and to reserve his objections for litigation in a collateral proceeding. Unless it appears that the court proceeded without jurisdiction or in excess of its powers, the presumptions that sustain judicial action and records will outweigh any collateral showing amounting to mere proof of voidability. The cases are very numerous upon this point. They hold without exception that a judgment will be sustained on collateral attack unless it is wholly and absolutely void; that it cannot be overcome by matters that merely render it voidable."
> (Emphasis added)

In Nicholas and in Arant, the Secretary acted within his authority in making

the removal order, and it was claimed the decision was wrong because he failed to give a statutory notice. In our case the Secretary acted beyond his authority.

We are reminded in Freeman on Judgments, (Sec. 354, p.734) that:

> "A wrong decision made within the limits of the Court's authority is error correctable on appeal or other direct review but a wrong, or for that matter a correct decision where the court in rendering it oversteps its jurisdiction and power is void and may be set aside either directly or collaterally. * * * Hence, though the court may have acquired the right to act in the cause and been put in possession of full jurisdiction to go ahead and dispose of the issues involved, its judgment in excess of the jurisdiction thus acquired or which transcends the judicial powers which it may rightly exercise under the law of its organization is subject to collateral attack for want or excess of jurisdiction even though the parties may have acquiesced or consented

> to the exercise of the jurisdiction which the court assumed to exercise, for no act or volition can confer a power upon the court which the law does not authorize it to exercise."

If "no act or volition can confer a power on the court which the law does not authorize it to exercise", it is plain that laches cannot serve to confer that power.

REPLY TO DEFENDANT'S CLAIM THAT COLLATERAL ATTACK ON VOID JUDGMENTS DOES NOT APPLY TO ADMINISTRATIVE ORDERS.

On page 5 of its brief defendant argues as follows:

> "Petitioner's sole contention is that laches cannot bar his claim for back pay, because the orders reducing his rank were made effective retroactively and without notice or opportunity to be heard and were therefore "void for lack of power to make" them (Pet.14). He cites many cases for the proposition that

> a void judgment may be collaterally attacked at anytime (Pet. 16-36). But this is not a collateral attack on a judgment of a court. It is an effort to overturn an administrative order some 18 years after that order was effective."

We have seen in Thayer v. Village of Downer's Grove, supra, that

> "It is a rule well established that a void judgment or order may be vacated at any time and the doctrines of laches and estoppel do not apply."

Defendant advanced the same argument below on rehearing, as follows:

> "Plaintiff's motion is based upon the theory that the doctrine of laches does not apply to a void order or judgment. He cites the comments of recognized authorities on Federal Procedure and the effect of judgments, and also cites some decisions of theSupreme Court of the United States to support his theory.
>
> A simple review of the authorities cited by plaintiff reveals that they have no application in the present case. Plaintiff's cited authorities

> deal with the effect of orders or judgments of established courts. They have absolutely no application in the case of an administrative order effecting the reduction in grade of an Army enlisted man for inefficiency."

Our reply* to that argument in this Court is the same as on rehearing below, where we said:

> "This astonishing claim, made in all apparent seriousness, is that an order, void on its face for want of jurisdiction, otherwise subject to collateral attack at any time at any place where it may be relied on, is beyond the reach of the courts because the void order here sought to be impeached is an administrative determination and as such, immune to collateral attack.
>
> It is enough to say that the Supreme Court, as early as almost a century ago, in Kilbourn v. Thompson, 103 US 168, 198, 26 L.Ed. 377, declared:
>
> 'The tendency of modern decisions everywhere is to the

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* Plaintiff's Reply Brief is on file in this Court.

> doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in any other proceeding, (See Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457; Knowles v. The Gas-Light & Coke Co., 19 id 58; Pennoyer v.Neff, 95 US 714.'

An administrative agency is such a "tribunal". So, too, is an administrative officer, say, the Secretary of an Executive Department such as the Department of the Army, or the Department of the Interior. And an administrative determination or order, made without or in excess of jurisdiction is void, subject to impeachment in collateral or direct attack, in like manner as a void judgment or order of an "established court."

In Oil Shale Corporation v. Udall, Secretary of the Interior, (D.C. Col, 1966), 261 F.Supp. 954, 965, the Court said:

> 'It is, of course, so fundamental as to require no documentation, that an adjudication by a tribunal

> lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be res judicata. When as here, the Department acted beyond the authority granted to it by law, it acted in the particular area beyond its jurisdiction. The Supreme Court told the Department this in language as plain as legal language can be. * * *
>
> This Court, however, must follow the law as laid down by the Supreme Court of the United States. It is upon this basis that we conclude that the actions of the Department in assuming jurisdiction over the failure to do assessment work is void and of no effect whatever.'

On the Secretary's appeal, the Court of Appeals affirmed: (10th Cir., 1969) Udall, Secretary of the Interior v. Oil Shale Corporation, 406 F 2d 759, 763, saying:

> 'We find no change in the authority of the Secretary since theSupreme Court decisions referred to above. There has been some relatively minor statutory

change, but it does not effect this issue. The Supreme Court held in Virginia-Colorado that the Secretary was acting outside his statutory authority when he cancelled the claims for the reason he did. The Court said:

> 'We think that the Department's challenge, its adverse proceedings, and the decision set forth in the Bill went beyond the authority conferred by law."

It was a clear and direct holding, and it followed the Krushnic decision and, of equal importance, it followed Cameron v. United States, 252 US 450, 40, S.Ct. 410. The decision must be taken by us to hold that the Secretary was without power or authority under the laws to bring the adverse proceedings on the ground it did, and to cancel the claims. This in the administrative area must be taken to mean his actions were void, and of no legal effect. They went beyond his authority conferred by law, and this is the sole source of his power. Pan American Petroleum Corp. v. Person, 284 F 2d 649 (10th Cir.). The Secretary so

> understood as indicated in the departmental decision in the Shale Oil Co., 55 ID 287, and by his later patenting of other cancelled claims. If his acts are so treated, the cancellation of the claims here concerned were of no effect, and they stand as if no departmental action to cancel had been taken.

The Supreme Court reversed, but on other grounds, (Hickel v. Oil Shale Corporation, (1970), 400 US 48, 27 L.Ed. 2d, 193, 91 S.Ct. 196), specifically leaving open on remand the validity of the administrative proceedings and judicial review "if they are found void", thus (at page 201 of 27 L.Ed.):

> 'Therefore, on remand, all issues relevant to the current validity of those contest proceedings will be open, including the availability of judicial review at this time. To the extent that they are found void, all issues as to the invalidity of the claims will be open.' "

ACCORD: National Labor Relations Board v Pappas & Co., (9 Cir. 1913) 203 F 2d 571; Pan Am Petroleum Co. v. Pierson, (10 Cir. 1960), 284 F2d 649; United States v. 1380 Acres of Land, (SD Texas 1950), 91 F Supp 1002, 1004.

CONCLUSION

The defendant's authorities are clearly inapplicable, and it remains that the single thrust of defendant's defense is that plaintiff's claim "is an effort to overturn an administrative order some 18 years after that order was effective." The trouble is that the order was never effective, and if there be a villain in the piece, it is the Secretary of the Army who exceeded his powers, for it is there that the root of the evil lies.

Obviously, the Courts will resist a stale claim, especially one of an inordinate delay of "some 18 years". But that is the simple meaning of the doctrine of laches.

Courts do not alter the law to fit the equities of a particular case

when the law universally is that there are no equities available under a void judgment or order that is as nugatory 18 years after the event as it was 18 minutes after the event. The passage of time cannot infuse life into those void orders.

The defendant has no standing to appeal to the conscience of the Court. If it were permissable to consider how equities preponderate under a void order, it would remain that the dilemma stemmed not from laches in asserting the claim, but from the fact that the Secretary acted in excess of his power and authority. The conclusion always remains that laches do not apply to a void order.

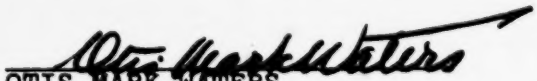
We are reminded by Austin v. Smith, (CA Dist.Col. 1962), 312 F2d 337,343, that:

> " * * * the only question for the Court is whether the judgment is void; if it is, relief from it should be granted."

That is the posture of the case in this Court.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,



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